IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 211.

GAST REALTY AND INVESTMENT COMPANY, and EMILY GAST,
Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY,
Defendant in Error

Petition for Rehearing

RODGERS & KOERNER,
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Olive 2930 Wilson Printing Co., Ninth and Walnut Central 3857

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Now comes Schneider Granite Company, defendant in error, and respectfully requests this Honorable Court to set aside the opinion and judgment heretofore rendered in this cause and to grant defendant in error a rehearing herein for the following reasons, to-wit:

First: The Court in its opinion and judgment inadvertently overlooked the fact that under the charter and ordinance one-fourth of the total assessment was levied against the property abutting on the street improved in proportion to its frontage, that is, under the "front foot" rule, and that this portion of the assessment is segregated from the whole and is separately apportioned in each tax bill.

Second: The Court inadvertently overlooked the fact that there is no showing or claim made in the record that the property of plaintiff in error has not been benefited to the full amount of the tax assessed against it.

Third: This Court inadvertently overlooked the fact that in drafting the charter provision here in question the charter framers acted in good faith, free from caprice, passion, prejudice or fraud, as did the people of the City of St. Louis in adopting it; that they legislated with reference to the whole City of St. Louis and not merely as to isolated parts; that the adoption by them of this charter provision necessarily involved a finding of fact that under the conditions existing in said city the rule prescribed, as a whole and on the average, will do substantial justice; and that under the law as heretofore announced by this Court in a long line of decisions this finding of the charter framers and people is conclusive.

Fourth: The Court inadvertently overlooked the fact that this charter provision requiring the district line to be drawn midway between the streets improved and the next parallel or converging street is based upon considerations of substantial justice and to meet the

exigencies of situations like that presented in the case at bar.

Fifth: The Court inadvertently overlooked the fact that even though notice be taken of the facts in the four cases in the Missouri Reports mentioned in the opinion, this Court had before it but five instances of the working of this charter rule out of thousands to which it has been applied.

Sixth: This Court, in its opinion and judgment inadvertently overlooked the fact that plaintiff in error, knowing that the assessment would be made in accordance with this charter provision, stood silently by while defendant in error was improving the street in front of his property.

HICKMAN P. RODGERS,
Attorney for Defendant in Error.

I hereby certify this petition for a reconsideration is presented in good faith, and in sincere belief it is founded on meritorious grounds worthy of consideration by this Honorable Court.

HICKMAN P. RODGERS,
Attorney for Defendant in Error.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

This Court has held the whole assessment void. In obedience to the charter provision one-fourth of the total of this assessment was levied upon all property abutting upon the improvement in proportion to its frontage, that is, under the well-known front foot rule, and three-fourths was levied upon all property within the assessment district in proportion to its area. No reason is given in the opinion why the one-fourth part of this assessment, levied according to the front foot rule, should not be upheld. The amount of such portion of the assessment chargeable against each respective lot or parcel of land is separately stated in the tax bill issued against such lot or parcel. The tax bill here sued on and in evidence (see insert in transcript at page 64) shows that the sum of $2570.13 is chargeable against the property which it covers as its proportion of the one-fourth part of the cost of the improvement levied according to frontage. To this extent at least this tax bill is valid and, should the Court deny our petition for a rehearing upon the whole case, we ask that it modify its judgment so as to give validity to this part of the assessment. An assessment may be good in part and bad in part and the good part enforced where it can be separated from the bad.

Neil v. Ridge, 220 Mo. 233.

— oOo —

A fact appearing upon the record of which this Court has made no mention, and which we therefore

think may have been inadvertently overlooked, is that there is neither pleading nor proof that the plaintiff in error was not benefited to the full extent of its assessment. Its contention is that it was assessed disproportionately to other property owners and this contention rests upon the one fact that the district line was drawn through its property farther from the street improved than it was through other property in the district. In our judgment this one fact does not necessarily show disproportionate assessment, but, however that may be, it is not evidence—certainly not conclusive evidence—that the tax exceeded the benefits actually received. If plaintiff in error has been benefited to the full amount of tax imposed, it would be plainly unjust to permit it to retain this benefit and pay no tax. Had it complained before the work was done it might have been in a different position, but if it has received full benefit for every dollar of assessment, it certainly should not be permitted to come in after the work is done and evade payment.

In its opinion in this case this Court says:

> "But as is implied by Houck v. Little River Drainage District, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand **against the complaint of one so taxed in fact.**" (Bold face type is ours.)

Plaintiff in error not having pleaded nor proved that it has been taxed in excess of benefits, does not come within the rule thus laid down.

The rule declared in Norwood v. Baker, 172 U. S. 269, and followed in the dissenting opinion of Mr. Chief

Justice White in French v. Barber Asphalt Paving Co., is stated in the former case as follows (page 278):

> "In our judgment the exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

Under this rule there must be a substantial excess of cost over benefit before there is a taking of property, and no such excess appearing from this record plaintiff in error does not come within the rule.

The present case is unlike the Salt Company case, decided at the present term of this Court, because there it was held that no benefit whatever was conferred by the improvement. Here it is a question of degree only —a large benefit having unquestionably been received by plaintiff in error.

— oOo —

The effect of the Court's opinion is to establish the legal principle that where a legislature or other body vested with legislative power in the premises, prescribes a rule to be followed in the levying of special assessments for local improvements, this Court will review such legislative action, and if it thinks it clear that the rule prescribed is of such character that as a whole and on the average it cannot be reasonably expected to work substantial justice, such rule will be held to be an abuse of legislative power and to be void as contravening the Fourteenth Amendment to the Constitution of the United States. That the legislative body, with all available data before it, has acted deliberately and in good faith, free from caprice, passion,

prejudice or ulterior motive, is apparently not sufficient. Not only must it act in good faith, but it must exercise good judgment.

This is, we believe, a broader rule than this Court has ever heretofore announced in a case of this character, and is of far-reaching effect. If consistently followed and applied, it must needs give rise to much uncertainty and confusion—in derogation of the general welfare.

Assessments alleged to be unjust have been complained of in this Court on numerous occasions, but never before, so far as we are aware, with the one exception hereinafter noted, has the rule of assessment prescribed by the legislative body been held to be invalid as obnoxious to the Federal Constitution. In upholding these various assessments this Court has taken occasion to say that the legislative determination is not open to review even though "oppressive" (Mattingly v. D. C., 97 U. S. 687, 692) or "mistakenly unjust" (Spencer v. Merchant, 125 U. S. 345, 353), or "inequitable and unequal" (Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 197) or even though "almost the whole benefit accrues to a few" (Chadwick v. Kelly, 187 U. S. 540, 545) and has used other expressions of like tenor. In the very recent case of Houck v. Little River Drainage District, it is true, the Court intimated that a rule of assessment would be set aside if "palpably arbitrary or plain abuse," and in other instances has used similar language, but after thus expressing itself the Court has with said one exception invariably upheld the assessment before it. What then is the line of demarcation between cases where the rule is "mistakenly unjust" or "inequitable and unequal" and will not be disturbed, and cases

where it is "palpably arbitrary" and will be set aside? Is it a shadowy line, vague and uncertain, varying "with the length of the chancellors foot?" If such it be, then no assessment can with certainty be called valid until it has been held so by this Court, for who can say when that point is reached when "mistaken injustice" gives way to "plain abuse?" Men's minds are cast in different molds, and it is even so with judges, and what to one learned bench may seem hardship merely, not warranting interference, may impress its successor as having passed the bounds of tolerable inequality and entered the field of palpable abuse.

Would it not be far more just and more practicable to uphold the legislative action when free from fraud, prejudice or ulterior motive? Is not honesty of purpose the true criterion and not excellence of judgment? What property has been benefited by a particular improvement and to what extent is a difficult question of fact. Its determination depends upon a variety of considerations—the location of the land, its frontage, area, contour, grade, the nature of its use and improvements—and other elements of value. Manifestly a legislative body is in a far better position than is a court to correlate these diversified elements and to give to each its proper value. It can scan the whole field—consider the conditions generally prevailing as well as the exceptional situation—and its conclusions are more apt to be on the whole substantially just than is a conclusion formed from a consideration of an isolated case. And not only would the probability of equality among property owners be best promoted by giving finality to legislative action when free from taint of prejudice or fraud, but certainty would be given to the law and stability of value to securities issued by

assessment districts. People are more willing to credit their legislative bodies with honesty than with wisdom.

Prior to decisions of this Court at the present term it has been the almost universal belief, founded upon the previous decisions of this Court in a long and unbroken line of cases that the legislative determination was conclusive, and upon the faith of this belief innumerable and extensive improvement and assessment districts have been formed throughout this country and have thriven, and tax bills, bonds and other securities to an enormous amount, issued by cities, drainage districts and the like, have been freely bought, sold and dealt in as unimpeachable securities. Public work has been done at minimum cost for certainty of payment always decreases cost of construction. But if this has been an erroneous view; if the true interpretation of this Court's previous utterances is that rules of assessment will be sustained only when coinciding with this Court's ideas of substantial equality; if the difference between the meaning of "inequitable and unequal" and "mistakenly unjust" on the one hand, and "palpably arbitrary" on the other, is one of degree merely; if the legislative action will be reviewed and set aside for supposed errors of judgment, however honestly made, then securities of this kind are of a precarious nature indeed and he who invests in them must needs depart from the field of investment and enter that of speculation. That feeling of certainty which is so essential to stability of value will necessarily be wanting. Contractors will no longer be willing to accept their pay in tax bills or bonds, nor will banks lend money on the credit of these securities; the hazard of payment for local improvements will necessarily enhance the cost thereof; all to the prejudice of the public good.

So confident were we that this Court would decline to review the equity of the rule prescribed by the charter and applied by the ordinance, that in our brief herein filed we made no effort to defend it, but with all deference, it is submitted that, if all surrounding facts and circumstances be considered, it can be demonstrated that the irregularity which it occasions in the width of the assessment district in this case, as well as in other cases, is neither irrational nor without relation to difference in benefits conferred.

The City of St. Louis contains over sixty-one square miles and is for the most part divided into city blocks, about 5800 in number, a great majority of which are of approximately the same size and shape. There are, of course, some blocks varying in dimensions from the common run, and here and there are tracts of unplatted land held intact by their owners for their own purposes. Some of the streets of the city are straight—some are crooked—some are curved—some are but little traveled—while others (of which Broadway is a conspicuous example) serve as main arteries for large districts. These facts, and many others, were before the charter makers and it is but fair to assume that they legislated with due regard thereto. They had to deal with the entire city and had before them the conditions generally prevailing, as well as the exceptional situations existing here and there. With all available data at hand they concluded that under the existing conditions the rule now assailed was the one most likely to do substantial justice.

It is true that under this rule as applied in a case like the present, the assessment district varies greatly in width at different places; but is it not also true that the width of the district served, and therefore benefited

by the improvement, likewise varies? Broadway, the street here improved, is one of this city's main thoroughfares (Transcript, p. 53). It may be called a "trunk" street, serving not only property abutting on its borders, but a large area, portions of which are quite distant from it. Just as a great trunk sewer serves all of the territory to which its branches extend, or as a great river drains the whole valley reached by its tributaries, so does a great thoroughfare like Broadway draw to it the traffic from a large surrounding district. Wherever its service extends, there surely the benefits of its improvements extend. Benefits follow service and cost should follow benefits. It would be manifestly unjust to charge the abutting property with the whole cost of an improvement, the benefits of which reach far out into adjacent territory; it would likewise be unjust to draw the district line equidistant from the improvement at all places; for, other conditions, such as proximity and availability of other thoroughfares, not being equal—the use made of Broadway would vary and its benefits would vary with its use. All territory that is nearer to Broadway than to any other parallel street of a certainty uses Broadway and receives its benefits; and this is especially true of an unplatted tract of land which is used as a whole, and which fronts on Broadway for over 1000 feet.

Where the ordinary condition exists of a street lined with city blocks of approximately the same depth, almost any general rule of assessment would be unobjectionable. Either the "front foot" rule, or an area rule requiring the district line to be drawn at all points equidistant to the street improved, would yield substantially fair results, and the charter rule here under discussion would produce almost perfect equality. But

when we come to the exceptional situation, such as is presented by the case at bar, where the street improved is a great thoroughfare, over which flows the traffic between extensive outlying districts and the heart of the city, and which is bordered with blocks of varying dimensions and with unplatted tracts of land, the "front foot" rule would be plainly unjust as imposing the whole tax upon but a small portion of the benefited area, and an assessment by area upon a district equal in width throughout its entire length would include some territory not tributary to the improvement and would exclude some land for the beneficial use of which access to the street improved is indispensable. This charter rule, however, furnishes a rational method of levying the tax with due regard to benefits conferred. Under this rule one-fourth of the whole cost is assessed against the abutting property in proportion to its frontage, and the balance is distributed over a district lying on each side of Broadway half way to the next parallel or converging street. In order to further approximate justice, where a lot fronting on Broadway and extending back to another street is used as a whole with Broadway as its outlet, the whole of the lot is included in the district, and where there is no parallel or converging street on one side, the district line on that side is drawn at the average distance of the line on the opposite side. All things considered, the application of this rule is more apt in a case like the present to justly portion the tax to the benefits than is either the front foot rule or an area rule calling for the formation of a district of unvarying width. And so it seemed to the charter framers after due and deliberate consideration.

The sole fact that this court had before it when re-

viewing the conclusions of the charter framers, was that in five extreme instances wherein this charter rule was applied, the distance from the outer line of the assessment district to the street improved varied widely at different places. Does it irresistibly follow from this one fact that this assessment is grossly unjust? Should all other surrounding conditions be lost sight of? Is it inconceivable that lots and unplatted tracts of great depth are more benefited by the improvement of a great artery than are small residence lots of equal frontage but of far less depth? Are there no additional facts and circumstances worth consideration in reaching a conclusion—facts which were available to the charter framers but were not before this court? Assume by way of illustration that the property here taxed to a depth of approximately 450 feet is used as a base-ball park and that practically all travel to and from this park is over the street improved; must it be said as a positive conclusion—unalterable by any considerations that might exist—that this base-ball park should be taxed to no greater depth than other property in the district that is intersected by other streets which are refused passage through this unplatted tract? And must the same be said of race tracks, clay burning plants and other tracts that are used and preserved as a whole for the particular purposes of their use? The charter makers thought not. They knew how the streets of the city ran and to what extent these various tracts are served by these main streets. It was to meet the exigencies of this very class of cases that this rule of assessment was adopted.

It may not be out of place to say that prior to 1901 the rule of assessment in force in St. Louis was the "front foot" rule and that in that year this provision

of the charter was amended. It was not the entire charter that was then changed, only this rule of assessment and certain other provisions relating to the formation of sewer districts. These changes were made after much thought and deliberation; public hearings were had and a committee of eminent lawyers was appointed to investigate this very question. The injustice of spreading the entire assessment according to frontage in a case like the one at bar being apparent, the front foot rule was departed from as not working a fair average of justice and the present rule adopted. Now this conclusion so carefully made after mature thought and deliberation is set aside as palpably unjust by this court, which has before it but five examples of its workings.

We respectfully submit that if careful thought be given the conditions existing in the City of St. Louis, and doubtless in other cities as well, there is much to say in favor of the justice of this charter rule. We especially urge that a true idea of the justice of its workings cannot be gathered from a few isolated cases, but that regard must be had to the whole city and to many conditions therein prevailing which are not embodied in this record, or before this court. These conditions were, however, before the eminent lawyers who framed the charter amendments and we do not believe that they were so blind to common fairness as to adopt a rule which on its face is "palpably arbitrary or a plain abuse."

Estoppel.

A fact which to us seems worthy of mention and consideration, but which is ignored by the Court in its opinion (and which we therefore believe may have

been inadvertently overlooked) is that plaintiff in error waited until the street upon which his property has a front of over one thousand feet had been fully improved—until his property had been greatly benefited by the work and material furnished by defendant in error—before he sought to have this assessment declared invalid. This is unconscionable conduct. Had plaintiff in error sought by injunction or otherwise to prevent the doing of this work his position would be far more righteous. He must have known that this work was being done, and that payment would be made by special tax bills issued in accordance with the charter, yet he permitted the work to proceed to completion before taking action. He has forfeited his right to complain. Many authorities uphold this contention—some basing their rulings on the ground of waiver or estoppel and others on the theory of an implied contract.

In Shepard v. Barron, 194 U. S. 553, at page 568, this Court said:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up."

In O'Brien v. Wheelock, 184 U. S. 450, 491, this court, while denying that the rule was applicable to the facts of the case before them, recognized its application in a case like the one at bar where the property owner has received the full benefit of the law. At page 491 the court said:

> "This result is not inconsistent with the cases that hold that although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

The Supreme Court of Massachusetts in the case of Atkinson v. Newton, 169 Mass. 240, at page 250, states the rule as follows:

> "Parties who lie by and permit great expenditures to be made, the benefits of which they will enjoy, are not to be allowed to avoid responsibility for the payment of any share of such expenditures by afterwards having the proceedings under which they were incurred quashed. Whately v. County Commissioners, 1 Met. 336; Noyes v. Springfield, 116 Mass. 87; Grace v. Newton Board of Health, 135 Mass. 490, 499."

In Smith v. Carlow, 114 Mich. 67, at page 70, the Supreme Court of Michigan forcefully says:

> "This drain is now constructed. All parties to the proceeding acted in good faith. There is no evidence of fraud. The entire proceedings were open and notorious, and evidently were known to most, if not all, whose lands were affected. The courts were open to them to contest its validity before the contractors had performed the work under their contract. The commissioners decided that it was a public necessity. Whatever advantage it is to the public has been reaped. It is just that the contractors be paid, and courts should compel payment unless some insurmountable obstacle stands in the way. We think this

case comes clearly within many other decisions of this court which hold that when parties stand by and see such improvements made, and take no steps to impeach their validity, they are estopped to question their validity when called upon to pay for them."

In the case of Fitzhugh v. City of Bay City, 109 Mich. 581, at page 583, the same eminent tribunal uses this language:

"It is apparent that the complainant and her agent both knew that the lands were so situated that any assessment, whether on the basis of benefits or frontage on the street, would include such lands, and yet they allowed the contractors to go on with the work, and receive their pay therefor, without objection. The collection of a special assessment for improvements will not be restrained at the suit of one who has stood by and raised no objection to the improvement."

The Supreme Court of Indiana, in the case of De Pauw Plate Glass Co. v. City of Alexandria, 152 Ind. 443, at page 452, expresses itself on this point with great clarity, as follows:

"It has been many times held by this court that if a taxpayer stands by, and without objection permits improvements to be made which benefit his property, he will be precluded from denying the authority of the municipality to contract for the improvements."

In the case of Board of Commissioners v. Plotner, 149 Ind. 116, the same learned court as that last above mentioned says:

"It is a general rule, now fully accepted in this state, that where the owner of property subject to

assessment for public improvements stands by and makes no objection to such improvements he may not deny the authority by which the improvements are made or defeat the assessment made against his property for the benefits derived; and this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings."

In the case of Patterson et al. v. Baumer, 43 Iowa, 477, 483, the Supreme Court of Iowa says:

"While the work of constructing the ditch was undertaken because demanded by the public interests, yet the petitioners, being land owners in the vicinity of the improvement, were interested therein. They must all be presumed to have notice of the action of the county in ordering the work and in causing it to be prosecuted. Some of them signed the petition to the supervisors asking that the work be done. They cannot be presumed to have been ignorant of any irregularities up to and including the letting of the contract. They should have objected thereto before the expenditure of money and labor by the county and contractor. The law will not permit them to remain silent until after the work is done and then raise such objections to defeat the collection of taxes."

This court in the case of Wight v. Davidson, 181 U. S. 371, *l. c.* 377, uses the following language:

"Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of a tax of which he subsequently complains, and some of the cases go far

in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor, or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. Cooley on Taxation, 573; Tagh v. Adams, 10 Cush., 252; Bidwell v. City of Pittsburgh, 85 Pa. State, 412; Lafayette v. Fowler, 34 Ind., 140; Shulte v. Thompson, 15 Wall, 151, 159."

In the case of Chadwick v. Kelly, 187 U. S. 540, at page 546, this court again recognizes this doctrine and holds that objections to the validity of tax bills cannot be raised for the first time after the work has been done and benefits received by one who had full knowledge of the progress of the work.

And so in the present case justice plainly requires that the contractor be paid and that plaintiff in error be not permitted to escape payment for the benefits it has received, and for which it knew that it would be called upon to pay according to the terms of the charter. It may well be said that by clear implication it has promised that its land may be charged for its share of the cost as assessed by the charter rule. Or the doctrine of estoppel, or of waiver, may be invoked, and plaintiff in error, not having spoken when he should, be now precluded from speaking when he would.

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Should the court agree with our contentions on some features of the case, but hold that they present no Federal question, and adhere to its views expressed in the opinion, then it is respectfully submitted that the order reversing the judgment should be modified so that the lower courts may take further action in the case con-

sistent with the views of this court. But, considering the far-reaching effect of the opinion of this court on the main question in the case, we respectfully ask for a rehearing and re-argument of the whole case.

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WILLIAM K. KOERNER,
Attorneys for Defendant in Error.

[redacted]

[redacted]

No. 28.

[redacted]

SUGGESTIONS OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTIONS FOR A REHEARING AND FOR MODIFICATION OF JUDGMENT.

[redacted]

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[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

GAST REALTY and INVESTMENT COMPANY and EMILY GAST,
Plaintiffs in Error,

vs.

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Defendant in Error.

No. 211.

SUGGESTIONS OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTIONS FOR A REHEARING AND FOR MODIFICATION OF JUDGMENT.

I.

It is not our purpose to reply to the motions for a modification of the judgment in this cause, which strangers to the record have undertaken to file as *amici curiae*. Those motions involve a serious proposition which is not presented by the record in the case at bar.

However, we will remark, and we trust that it is not out of place to do so, that we are very confident that the aggregate amount of the outstanding tax bills, issued by the City of St. Louis under the late charter for street improvements, has been greatly overestimated in one of these motions. While we have not made any special inquiry upon the subject, and must, therefore, rely upon our general knowledge of the situation, we doubt whether the actual amount of those tax bills, including the assessments against large unplatted tracts, exceeds one-fourth of that estimate.

It is our intention to address ourselves to two propositions which are raised by the motion for a rehearing which has been filed by the defendant in error, and which were not heretofore presented by the defendant in error, either in brief or in oral argument. These we will proceed to consider in a very brief manner.

II.

The first of these propositions is that so much of the tax in question as is levied according to frontage, namely, twenty-five per cent, is a void assessment. Aside from its not having been presented heretofore, there are two valid grounds of opposition thereto, namely:

(1) The tax is levied under a legislative provision, which is void in its entirety. The ordinance provides for the issue of special tax bills for the entire cost of

the work as payment therefor. The direction of the charter that one-fourth of the tax for the cost of a street improvement shall be apportioned according to frontage is an integral and an inseparable part of the whole.

> "If an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held to be inoperative."
>
> Connolly v. Union Sewer Pipe Co., 184 U. S. 540, *l. c.* 565.

Views directly supporting our foregoing contention are expressed in the excellent work of Page and Jones on Taxation by Assessment, Section 81, page 135.

(2) The twenty-five per cent of the cost of the improvement which is levied according to frontage is assessed, and under the charter and the ordinance must be assessed, against all the property of the plaintiff in error lying between the street improved and the midway line between it and the next parallel or converging street. The part of the tax levied according to frontage is, therefore, subject to the same infirmity as the remainder of the tax. Property too remote from the street improved to be benefited by the improvement is subjected to the frontage tax, just as it is to the area tax.

III.

The second ground urged for a rehearing which we desire very briefly to consider is the claim of estoppel.

It would suffice, with respect thereto, to say that no estoppel has been pleaded.

Taylor v. Patton, 160 Ins. 4, *l. c.* 9, 10.

It would also be sufficient in itself to say that no claim of estoppel or waiver was advanced in any form in the trial court.

Furthermore, when the ordinance or law underlying a local improvement is invalid, an estoppel to urge its invalidity does not arise, under the rulings in Missouri, from mere silence or mere failure to object, even when the invalidity is known.

Perkinson v. Hoolan, 182 Mo. 189;
McCormick v. Moore, 134 Mo. App. 669, *l. c.* 680.

But we do not wish to remain content with the foregoing answers to this claim. We desire to add that there is not an iota of evidence in this case that the plaintiff in error knew of the ordinance in question or of the work done under it until the work had been completed and the tax bill therefor presented, and that the question of the constitutionality of the law was one as to which the defendant in error was as well informed as the plaintiff in error, since it has been agitated in the courts of Missouri continuously from the time of the adoption of the charter provision to the present time.

We do not believe that any authority can be found anywhere for a claim of estoppel under these circumstances.

Respectfully submitted,

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DAVID GOLDSMITH,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1915. No. 211.

GAST REALTY AND INVESTMENT COMPANY AND EMILY GAST, *Plaintiffs in Error*,

v.

SCHNEIDER GRANITE COMPANY, *Defendant in Error*.

SUGGESTIONS OF

FREDERICK W. LEHMANN AND BENJAMIN SCHNURMACHER AS AMICI CURIAE FOR A MODIFICATION OF THE DECISION HEREIN.

PRESS A. R. FLEMING PRINTING CO., ST. LOUIS

Supreme Court of the United States

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SUGGESTIONS OF

FREDERICK W. LEHMANN AND BENJAMIN SCHNURMACHER AS AMICI CURIAE FOR A MODIFICATION OF THE DECISION HEREIN.

On behalf of a number of interested parties, we beg, as *amici curiae* to offer some suggestions for a modification of the decision in this case.

There has been much paving done in the City of St. Louis under authority of the charter provision here involved, and unpaid tax certificates therefor, to an amount approximating and perhaps exceeding two millions of dollars, are outstanding, which are held by contractors, banks, trust companies and individual investors who although not parties to this suit are vitally interested in the result, as they construe the decision and opinion of the Court.

The facts in the present case are quite exceptional. True, a few other cases like it may be found, and the Court in its opinion calls attention to some of them. They occur in the remote districts of the City where there are large tracts of land which have not yet been subdivided into City blocks and lots. But generally speaking and especially in the districts in which paving has been done, the City of St. Louis, like the other large cities of the country, is laid out on the checker board plan, that is, into squares bounded by principal streets. The subdivision is definite and final and no more streets and alleys are to be laid out in these sections.

And generally speaking the lots, in these sections, upon the two sides of the street are of equal depth and as between such lots, the combined front foot and area rule prescribed by the City charter results in an equal distribution of the expenses of paving. Sometimes even in the developed sections of the city lots are not all of equal depth and the charter rule casts upon the deeper lot a larger portion of the expense. And to the deeper lot the improvement obviously would be of greater value. But such cases are not like the one at bar. The differences in depth are not marked. Each lot is charged only with respect to the street upon which it abuts, while in the case of the large undivided tract new streets may be laid out through it in the future, the entire cost of paving which the tract must bear.

When, as is the usual and ordinary case, the land has been definitely and finally subdivided into small squares surrounded by principal streets, and we are dealing with city lots, which are in full use as such, the charter rule as to them operates as fairly as any rule can, and as to them should be upheld. If in the same taxing district with such blocks and lots, there are included large tracts of undivided land, the owners of the City lots cannot fairly complain of the area factor in the charter rule. They have not been injured by it, but have been relieved of what the Court holds is a portion of the expense properly chargeable to them.

The people not injuriously affected, but on the other hand favored by the rule, should not, because taxed at less than their share, escape taxation altogether. The charter provision and the ordinance enacted in pursuance of it, do not take their property without due process of law.

These suggestions have of course no relation to the operation of the decision in so far as it holds that where as a probability under the rule "parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand **against the complaint of one so taxed in fact.**" But there is apprehension that the decision goes beyond this. In the closing paragraph of the opinion it is said "that the ordinance following the orders of the charter **is bad upon its face** as distributing a local tax in grossly unequal proportions not because of special considerations

applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

This it is feared invalidates not only the ordinance, but as well the charter provision, *in toto*, and so nullifies all tax certificates for paving done under authority of the charter provision, even those which charge the property with what under the decision of the Court is less than its fair share of the expense.

It is respectfully suggested that the decision and opinion should be so modified as to avoid such a result.

F. W. LEHMANN,
BENJAMIN SCHNURMACHER,
Of Counsel for Certificate Holders.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 211.

GAST REALTY AND INVESTMENT COMPANY, and EMILY GAST,
Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY,
Defendant in Error

Motion of Attorneys for the City of St. Louis for Leave to Enter Appearance as Amici Curiae; for a Rehearing of the Cause and for a Modification of the Opinion; and Brief in Support Thereof.

CHARLES H. DAUES and
TRUMAN P. YOUNG,
Attorneys for the City of St. Louis.
As Amici Curiae.

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Now come Charles H. Daues and Truman P. Young, attorneys for the City of St. Louis, a municipal corporation of the State of Missouri, and appearing for and in behalf of said city, respectfully ask leave of Court to enter appearance in this cause as *amici curiae* for and in behalf of the City of St. Louis; and said counsel respectfully request the Court to set aside the

decree and judgment entered in this cause on the 31st day of January, 1916, and grant a rehearing of said cause with leave to said counsel as *amici curiae* to appear and argue the same for and on behalf of the City of St. Louis. And said counsel further petition the Court, if said rehearing be denied, that the opinion in this cause be so modified as to show that it is not intended to indicate that the provisions of the Charter of the City of St. Louis are invalid, but merely that the particular ordinance passed in accordance with the provisions of the Charter which was in controversy in this case cannot be enforced as against the property of the plaintiff in error, though enforceable against other property within the assessment district which has not been injured by reason of the alleged inequalities in the boundaries of said district.

And for ground of this motion said counsel respectfully show to the Court that the provisions of the Charter of the City of St. Louis attacked in this case were passed in the year 1901, in reliance upon the decision of this Court in the case of French v. Barbar Asphalt Paving Co., 181 U. S. 324, which was decided in 1900, and said provisions have been in force ever since; that under such said provisions the city has improved many miles of streets and issued tax bills therefor in the sum of many thousands of dollars; that in the vast majority of delete cases a district bounded as provided by the provisions of the Charter will present no arbitrariness and no unusual inequalities, and that it is only here and there, in exceptional cases, that the district will be found to present such inequalities as could be termed arbitrary, or be said to present an abuse of power. And said counsel respectfully show to the Court that the provisions of the City Charter should not be held

invalid and subject to attack by persons who have not been injured by the alleged arbitrary and irrational method of defining assessment districts; that no one should be allowed to escape the payment of special taxes upon the theory that other owners of property have been injured by an arbitrary or irrational method of establishing the district for taxation. And counsel respectfully show to the Court that as a result of the opinion in this case, owners of property have refused, and will refuse, to pay any special tax bills issued by the City of St. Louis under its former charter for the improvement of streets, and are contending, and will contend, that all the provisions of the Charter for the issuance of such tax bills have been declared to be void, so that no tax bills issued thereunder can be enforced.

And counsel further respectfully show to the Court that this case presents no such inequalities as regards the property of plaintiff in error as to be justifiably called an arbitrary or plain abuse of power; that in the City of St. Louis there are numerous large tracts of land, parks, cemeteries, breweries, factories, and other parcels of land used for business and private purposes, all of which are especially benefited by the improvement of adjoining streets, and all of which should be taxed on account of their area, as well as on account of their frontage, for the improvement of such streets. And counsel respectfully show to the Court that there are outstanding many thousands of dollars worth of special tax bills issued under the former Charter of the City of St. Louis held by contractors, banks and trust companies, and which have been issued on account of the improvement of streets in the City of St. Louis and against taxing districts which present no

irregularities and no unfairness or arbitrarily unequal distribution of taxes, and which in all fairness ought to be enforceable and collectible, even though it should be ruled that in some exceptional cases a taxing district laid out in accordance with the provisions of the Charter would present such irregularities as to render the tax bills issued against certain parcels of land uncollectible.

And counsel show to the Court that even in those districts where irregularity is shown in the boundaries of the district such irregularity accrues to the benefit of all except certain persons whose property is included in the district, but which would not have been included if the district had been drawn so that its boundaries were more regular in shape; that the inclusion of such property works a benefit to all other property in the district and that the owner of such other property should not be heard to complain of the inclusion within the district line of property which this Court might hold could not be, consistently with the Constitution of the United States, included therein.

Wherefore said counsel pray for leave to be heard, and that this cause be set down for rehearing, or that the opinion herein be modified as above prayed.

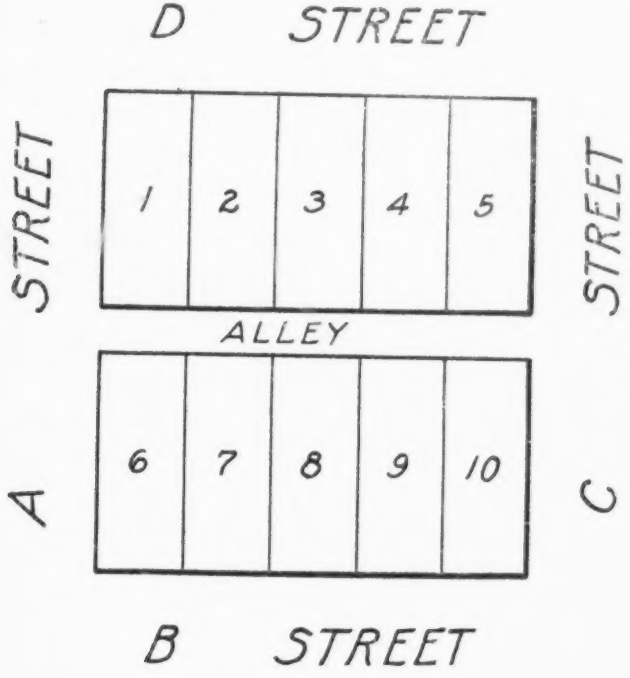
CHARLES H. DAUES and
TRUMAN P. YOUNG,

Attorneys for the City of St. Louis,
Appearing as Amici Curiae.

ARGUMENT IN SUPPORT OF MOTION.

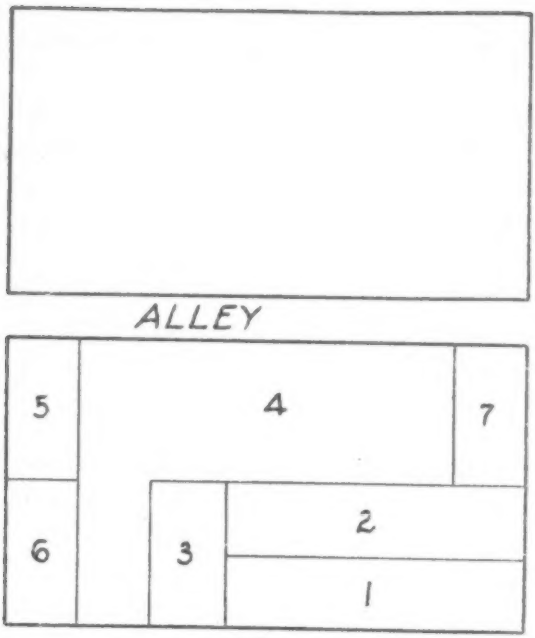
I.

Prior to 1901 the paving of streets in the City of St. Louis was paid for by assessment of adjoining or abutting property according to frontage. This method of assessing benefits was sustained by this Court in the case of French v. Barber Asphalt Paving Co., 181 U. S. 324. It was generally recognized, however, that this method of assessing benefits worked a very obvious hardship upon the owners of corner lots. We can best illustrate this by a diagram as follows:



Referring to the above diagram it is obvious that when B street is improved lots 6 to 10 will be assessed in accordance with their frontage. When D street is improved lots 1 to 5 will be so assessed. But when A street is improved the entire cost will fall upon lots 1 and 6; while likewise when C street is improved the entire tax will fall upon lots 5 and 10. It is quite out of the question to suppose that there is a corresponding benefit conferred upon the corner lots. If lot 1, for example, fronts upon D street, the benefit conferred upon it by the improvement of A street is very little if any more than that conferred upon other lots in the block. Here was a case, then, where, notwithstanding that, as a matter of technical law, the method of assessment was sustained, nevertheless, as a matter of practical application, it was obvious that the assessment was by no means made in accordance with the benefit.

Let us take another illustration, as shown upon the following diagram:



Let us assume that Lot 4 is used for a steam laundry, and that the other lots are improved with small buildings having grocery stores, saloons, etc., on the ground floor and living rooms above. For the improvement of A street, Lot 1 will pay half of all the assessment for the block. The other half will be divided between Lots 3, 4 and 6. Lots 5 and 7 will escape taxation altogether. Now, it is quite obvious that Lot 4 will be benefited much more than Lot 1, Lot 3 or Lot 6. It will be benefited more because it is a larger lot. It has the same frontage as Lots 3 and 6, to be sure, but it has a much larger area. And it by no means gives us an

equal distribution of the tax for the construction of A street if we fail to consider the area of Lot 4 in making the assessment. If a district line, however, is drawn half way back to the next parallel street, namely, in the center of the alley, as was done by the provisions of the old Charter, Lot 4 would then be taxed on account of its area, as well as on account of its frontage. Thus, in this case also, an obvious advantage is gained by drawing a district line half way back to the next street and considering the area as well as the frontage in assessing the tax.

The City of St. Louis desired to begin a general scheme of improvement of streets because of the fact that the World's Fair was to be held there in 1904, and it was desired to have an amendment to the Charter which would more equally distribute the burden. For this reason it was determined to assess only one-quarter of the cost against the property abutting upon the street in accordance with the length of its frontage, and to distribute three-fourths of the cost against all the property in the half-block in accordance with its area. Now it is quite clear that in those parts of the city where blocks of approximately uniform size have been laid out this scheme of taxation was decidedly more equitable than the former one.

The answer to this, of course, will be that the city is not everywhere laid out in blocks of approximately equal size. We shall comment later on upon this contention as regards race tracks, ball grounds, cemeteries, etc. We do not believe that there is any inequality or unfairness in requiring such property to be taxed in accordance with its area for the improvement of adjoining streets. If there is any inequality in such taxation it rests entirely in the realm of speculation.

Frequently the improvement of streets adjoining such tracts of land is made largely, if not entirely, for the benefit of such tracts. At least we do not see how the Court can say that a legislative determination that such tracts are benefited is a palpable abuse of discretion.

But it will be answered that there are other parcels of land which are merely acre property, used for truck farms, or lying vacant, and which ultimately will, with the growth of the city, be platted and subdivided. The question as to the propriety of compelling such property to pay in accordance with its area for the improvement of adjoining streets, we believe, should not be decided until it is presented in a case involving such property. To suppose that the city will proceed to condemn a street through a portion of the city which consists of mere truck gardens, and then improve such street and levy taxes for a distance of one thousand feet or half way over to the next street, is merely to presume that the administrative branch of the city is going to proceed to apply the provisions of the Charter in such way as to constitute an abuse. It is at least a significant fact, however, that none of the cases which have reached the Supreme Court of the State of Missouri, and which are cited in the opinion here, deal with such property at all. Some of them do deal with property privately owned and which consists of rather large tracts, but the property owner is at liberty at any time to subdivide his property and to dedicate streets, as we shall show later. Now, we do not suggest that the owner of property should be penalized in any sense for his failure to do so. It is, of course, his entire right and

privilege to retain a large tract in the heart of the city and compel the city to condemn streets through it if it desires to acquire them. He would not be subject to any possible criticism for so doing. But at the same time his act would bring about the legal result that his property is to be treated as one entire tract adjoining upon certain streets and is to bear its share of the burden of improving those streets. We can see no inequality in this result. His property is held probably for speculative purposes. He has bought it at a small sum, and while not desiring to improve it himself, he desires to hold it until the general growth of the city enhances its value; and the enhancement of that value is largely brought about by the improvement of adjoining streets. If a man owns a tract of land consisting, let us say, of five acres, and the city grows up all around it, it is simply contrary to the common experience of mankind to say that the entire tract has not been benefited by the improvement of the four streets adjoining it; and there is no reason why the heart of the property should escape sharing the payment for that enhanced value merely because the property owner prefers to hold the entire tract as one parcel rather than to sell it off in small parcels.

II.

To all of this, however, the objection will be raised that the Charter provided for a hard and fast rule which was to be followed in any event. It will be said that if the district as shown by the present assessment had been fixed by a board of commissioners, after an examination and a hearing, the Court might not interfere, but that the present assessment is not the

result of the discretion of any board, or of a jury of commissioners, but is merely the automatic application of a hard and fast rule fixed by the Charter. This suggestion, however, is exactly the contention which was made in the above cited case of French v. Barber Asphalt Paving Company, 181 U. S. 324. The real objection to the rule assessing the benefit according to frontage is very clearly stated in the dissenting opinion, for example, *l. c.* 348:

> "It thus appears that under the charter of Kansas City the cost of paving or repaving any street, avenue, alley or public highway is put upon the abutting property under a **rule** absolutely excluding any consideration whatever of the question of special benefits accruing, by reason of the work done, to such property."

This is a succinct statement of the grounds of Judge Harlan's dissent. The objection was that the tax was levied, not according to the discretion of anybody, but according to an arbitrary rule fixed in advance. The dissenting opinion is a vigorous assertion that such a scheme of taxation could not be upheld. See, for example, also, p. 350, referring to the case of Norwood v. Baker, 172 U. S. 269:

> "And the question was distinctly presented whether a special assessment for the cost of opening the street through private property could be sustained under the Constitution of the United States if it was made under a **rule** excluding all inquiry as to special benefits accruing to abutting property by reason of such improvement."

And there is more to the same effect. But the Court in the majority opinion did not accede to the conten-

tion that the establishment of a general rule was a violation of the 14th amendment. The majority opinion was to the contrary. The tax was upheld. The case is especially interesting because it originated in the State of Missouri and reached this Court by writ of error to the State Supreme Court to reverse a decision which construed and upheld the Charter of Kansas City, a Charter whose provisions were quite similar to those of the Charter of the City of St. Louis as it existed prior to the amendments of 1901.

Having thus the approval of this Court of the prior provisions of the Charter, the City, nevertheless, felt the inequalities inherent in the so-called front-foot rule. It therefore, attempted to devise a scheme of taxation which would have the merits of that rule and at the same time would eliminate the unequal burdens placed upon corner lots. The amendments of 1901 were the result. If an arbitrary rule fixed in advance is to be sustained where the tax is levied according to feet of frontage, we do not see upon what principle it can be said that in this case the tax should be declared void merely because the city authorities were following a rule fixed in advance. The case, we believe, should be considered exactly as if a board of commissioners or a legislative body had defined this district in a separate finding. It may be that the establishment of a general rule in advance will result in certain assessments being void because of their arbitrary character, but we do not see how it can be ruled that, because such rule was fixed in advance, therefore all assessments levied under it are to be invalidated. There being nothing inherently illegal in the principle of establishing a general rule for such taxes, any rule

which is general in its application and operates uniformly upon all property similarly situated should be upheld. The present rule may in extreme cases present certain hardships. The front-foot rule presents a hardship in every case, yet the front-foot rule has been sustained.

In the majority opinion in the French case the Court more than once refers to the method of assessing special taxes by area as a valid method. For example, *l. c.* 342 (referring to previous decisions):

> "It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by the commissioners."

And there is more to the same effect throughout the opinion. Here was a case decided in 1900 by this Court and in the light of which the amendments of 1901 to the St. Louis Charter were drawn. Now, in the above quotation we would call the Court's attention to the fact that the language is "the **class** of lands to be assessed may be either determined, etc." Also that the tax may be levied upon land in proportion to the **position**, the **frontage**, the **area**, or the market value, the intention obviously being that a general law may

be drawn which shall define the general **class** of lands to be taxed, or a general law may be drawn which may define the **position** of lands to be taxed. The law may require the tax to be levied in accordance either with frontage or area.

The contention that property has not been platted and therefore should not be taxed is an old one in special tax cases of this character, both in the decisions of the Courts of Missouri, and in the decisions of this Court. The assertion has been repeatedly made and repeatedly overruled, that unplatted lots ought not to be assessed for the improvement of adjoining streets. For example, in Kelly v. Pittsburgh, 104 U. S. 78 *l. c.* 81:

> "It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city—the water tax, the gas tax, the street tax, and others of similar character."

The contention, however, was overruled.

It might seem from the opinion that the taxes in controversy were general in character, but evidently they included taxes for street improvements also, for the Court says at page 82:

> "These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion."

In Spencer v. Merchant, 125 U. S. 345, this Court said, at page 356, that the legislature of the state "is

authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of both these facts to the judgment of the commissioners." Here we find again that the Court uses the language: "class of lands." The language of the opinion is not that the legislature might define the district by a special act, but merely that the legislature might determine the **class of lands** which will receive a benefit. This, we take it, obviously refers to the power of the legislature by general enactment to define the class of lands which are to be included within the assessment district.

In the case of L. & N. Railroad Co. v. Barber Asphalt Co., 197 U. S. 430, this Court was considering just such a general law. The Court points out that the law was different from a special act authorizing a particular improvement. The Court says, *l. c.* 432:

> "But we take the statute as a general prospective law and not as a legislative adjudication concerning a particular place and a particular plan," etc.

In Cleveland, Etc., Ry. Co. v. Porter, 210 U. S. 177, this Court sustained a special tax levied upon property which did not abut upon the street improved. This tax was also levied apparently in accordance with a general law operating prospectively as to all improvements. The Court expressly affirmed and approved of the case of Voris v. Pittsburgh Glass Co., 163 Ind. 599, which sustained a general law providing for the establishment of assessment districts and including prop-

erty, whether subdivided or unsubdivided, lying back from the street improved.

III.

The City of St. Louis, like all other cities in the United States, is not laid off throughout its entire area in blocks of equal size. It is, however, in a great portion of its area laid off in blocks of such shape that the drawing of a line as a boundary of a taxing district midway between an improved street and the next parallel or converging street will do substantial justice to the property owners. It is obvious that though some cases of irregularity and hardship might be presented, nevertheless in all cases where streets have been laid out and the city placed in a permanent condition as regards its streets, no hardship can result by requiring the assessment district to be bounded by a line half way to the next street on each side of the street improved.

To this it is replied that there are many parts of the City of St. Louis where the bounding of a district in this way will result in the establishment of irregular shaped districts and the inclusion of property in some places much further from the street improved than in other places, and therefore it will be said that such a scheme is invalid. Let us take, for example, a case cited by the Court in its opinion, to-wit, Gilsonite Roofing & Paving Company v. St. Louis Fair Association, 231 Mo. 581. We select this case as probably it will be called the most glaring case that could be found in the books, a case where the district line was drawn about two thousand feet from the street improved through the grounds of the St. Louis Fair

Association. Now, let us see upon what ground it is asserted that this was an improper procedure. In order to present the question succinctly we beg to quote the following from the opinion here:

> "The City of St. Louis is shown by this case, and by others in the Missouri reports, to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit."

Now we desire to accent the words in the above quotation "not yet cut into city lots." These words assume that the property in question will some day be cut into city lots, and therefore should not be taxed for the improvement of Grand avenue. This very question we have had occasion to argue at considerable length before the Supreme Court of Missouri. Now, as a matter of fact, the ground of the St. Louis Fair Association never will be cut into city lots. We go further. The ground of the Calvary Cemetery Association, the ground of the Bellefontaine Cemetery Association, the ground of the Missouri Botanical Garden, and the ground of Tower Grove Park never will be cut into city lots. We may even go further than that. The large plant of the Anheuser-Busch Brewing Association which occupies an area sufficient to cover many blocks, never will be cut into city blocks. Neither will the ground now occupied by numerous factories, and clay mines, such as the Laclede Christy Clay Products Company, the Evans-Howard Brick Company, and numerous others. There exist in the City of St. Louis many tracts which are occupied permanently and

which give no indication that they will ever be subdivided into city lots for any purpose.

Now the question arises, are such tracts of land benefited by the improvement of adjoining streets? The question is even more narrow than that, to-wit: Is a legislative determination that such tracts are benefited so entirely arbitrary that the Court may say it is a violation of the 14th Amendment? Can the Court say, for example, that a cemetery is not so benefited by the improvement of an adjoining street as to justify its being taxed on account of its area? Can the Court say that a large tract of land occupied by a brewery is not so benefited as to justify such a tax? Where is the line to be drawn? Can the Court say that a cemetery is to be taxed only for a distance, let us say, of three hundred feet from the improved street, although, as a matter of fact, it extends back for a distance of one thousand feet? According to such rule large portions of real estate would escape taxation for the improvement of streets altogether in a way which would present decided inequalities as a matter of fact, even if not as a matter of law.

For example, a cemetery or baseball ground is accessible only over muddy roads which adjoin it on all sides. It starts an agitation for the construction of asphalt streets; the property owners, it may be, are content with their mud roads; but the property which is most benefited, and, as a matter of fact, most desirous of easy access, is the very tract of land in question, to-wit, the cemetery or the baseball ground. For the sake of providing access to that land the asphalt streets are constructed, and thereupon, on account of some theory of law that a special benefit is conferred,

all of the adjoining lots are taxed, both on account of frontage and on account of area, but the large tract is taxed on account of its frontage and, as we understand it, only on account of a very small portion of its area. Here we have a typical case of property which absorbs nearly all the benefit and yet escapes a very considerable portion of the burden.

It was contended in the St. Louis Fair Association case, before the Supreme Court of Missouri, just as it was contended here in the present case, that the Charter should not be held to be applicable to "unsubdivided tracts of land." Now, in the first place, when are we to regard a tract of land as subdivided so that it is proper to draw the boundary line of the taxing district midway to the next parallel street? Streets may be created either by the act of the owner in dedicating his property for use as a street or by condemnation. The provisions of the Charter in regard to the subdivision of city property are found in Section 1 of Article 6. It is there provided that

> "In all cases when any lands within the city are hereafter subdivided or laid out in blocks, lots, or sub-lots, the map or plat thereof shall bear the certificate of a responsible surveyor, to the effect that the streets thereon represented are correctly shown and located, and they shall be designated as streets, if they have been or are dedicated or opened according to law, or as proposed streets if such opening is incomplete. Said map or plat shall be submitted to the board of public improvements for its approval. No such map or plat, or deed or instrument containing such map or plat shall be recorded in the Recorder's office of the City of St. Louis, or have any validity, until the approval of said board is endorsed thereon."

Now, there is no provision to compel property owners to subdivide their property. The subdivision of property is entirely within the control of the owner except that the plat must meet with the approval of the Board of Public Improvements. If the owner desires to file a plat and to dedicate streets which are a thousand feet apart, that would be a subdivision within the meaning of the Charter; and so if he sees fit to establish streets half a mile apart.

On the other hand, the city may condemn property for the purpose of constructing a street. Suppose the city condemns two streets through a large tract of land one-half a mile apart; is such property then to be considered as subdivided? In other words, how can the legislature predict how far the process of subdivision is going to go? How can the Court predict it?

No city is laid out in exactly rectangular form in blocks of equal size. Cities are dotted with parks, both public and private, and are crossed by streets which run diagonally. Certain property within every city is thickly populated and divided into small blocks; other property is vacant perhaps temporarily and perhaps permanently. There are residence districts and business districts, and other districts where large factories occupy several blocks. The question in framing the general law then is presented, as to how the law should be drawn so that it will be applicable to all property situated within the city limits. If the legislature divides the city into sewer districts, for example, and provides that all property within each district is benefited by constructing a sewer, that determination is conclusive. If the law-making body lays out streets and boulevards and decides that certain property within a district defined by general law is benefited by the

construction of such streets and boulevards, that determination is conclusive of the question. For how can the Court determine whether or not a certain piece of property is benefited by a given improvement and to what extent? The contention that the Court can do so was expressly repudiated in the line of cases begining with French v. Barber Asphalt Paving Co., 181 U. S. 324, and ending with Farrell v. West Chicago Park Commissioners, page 404 of the same volume.

In what way did the assessment in the Fair Grounds case work any injustice or hardship upon the property owner? It was contended that its land might be subsequently subdivided and gridironed with streets for which its property would then be again assessed. Such contention overlooks the fundamental fact confronting every city in enacting general laws of this character. If one sees fit to establish a private park and prevent it from becoming settled and used by citizens, is he to be allowed to escape taxation until he sees fit himself to subdivide his property, or until the city finds it necessary to condemn streets through it? In the meantime, of course, the property will have greatly increased in value and the amount received from such condemnation proceedings will be accordingly increased. Or suppose that one is using a large tract of land for business purposes and not for private use, for example, for the operation of a large factory, or as a public race track, or ball ground. Is such a property to escape taxation though obviously more benefited in reality than other adjoining tracts, merely upon the speculative ground that at some subsequent time the factories may be torn down, or the raec track abandoned, and the property gridironed with streets, and all this in direct

contravention of an express statutory provision saying that the property has been benefited by the improvement?

The Fairgrounds Association insisted, as the plaintiff in error insists here, that a different rule should be applied to subdivided property from that which is applied to property which has not been subdivided, and insisted that to apply the same rule in both cases would work an inequality. We confess that we are unable to see wherein the inequality consists. We do not believe that the fact that the Charter subjects all property alike, whether subdivided or unsubdivided, to liability for the improvement of streets adjoining it renders the provisions of the Charter unconstitutional. In fact to accede to the contention of the Fairground Association, in the case under discussion, would be to allow large tracts of land to escape taxation for an indefinite period and perhaps altogether. If a large tract of land is used as a brick yard or for a factory or brewery, such use in the usual course of things continues for many years and the property in such cases is obviously benefited by the improvement of adjoining streets. So, if property is used for a private park the entire property should be made to share in the assessment of benefits, if for no other reason because (reversing the argument of the plaintiff in error) said property may never be subdivided. If we are to deal in conjectures, the probability is at least as strong one way as the other.

If it be conceded that property used for business purposes should be taxed, then we think it necessarily follows that property used for private amusement or as a private park should be taxed. Here we might add that the same rule is applicable to public as to private

parks under the Charter, except that in case of public parks the city itself is liable for the tax which would be assessed against the park if private. A glance at the map of the City of St. Louis will show private boulevards, railroad yards covering several blocks, public parks and private parks, such, for example, as the Missouri Botanical Garden, known as Shaw's Garden, the title of which is vested in a board of trustees; Tower Grove Park, the title of which is also vested in trustees; Westmoreland Place, and Portland Place, which were considered by the Supreme Court of Missouri, in the case of Collier Estate v. Western Paving and Supply Co., 180 Mo. 362, Bellefontaine Cemetery and Calvary Cemetery, both of which are held and controlled privately. In all of these cases can the Court say that there is any probability that they will ever be gridironed with streets as contended by those who have up to the present time unsuccessfully attempted to attack the provisions of the Charter? Can the Court say that because of this future possibility such parcels of land should not be taxed according to the same rule applicable to all other property adjoining improved streets, or can the Court say that they have not been benefited by the improvement? That we believe has been conclusively determined by the enactment of the Charter itself.

Furthermore, the life of streets in the nature of the case is limited. Suppose it be true that Calvary Cemetery may some day be subdivided into city blocks. Will that happen during the life of, let us say, Broadway on the north or Florissant avenue on the south. It is not material for the Court to consider what may happen to this tract of land in the course of a century. There

is no reasonable probability that the tract will ever be subdivided. But it may be said to be a moral certainty that it will not be subdivided during the life of any construction work which might be done during the year 1914.

But it will be answered that in the case at bar the property actually is to be subdivided by two additional streets. Now the plaintiffs in error were entirely aware that Broadway was to be improved, at least they were charged with notice of it. A public hearing was held before the letting of the contract and the ordinance for the improvement was duly advertised. Furthermore, it may not be altogether amiss for us to state, going outside the record, that the owners of this property did as a matter of fact have conversations with public officials in regard to the improvement of Broadway, and it was suggested to them by such officials that they file dedication plats so as to avoid the assessment of their property half way to Church road. We make this statement because we understand that the question was asked during the oral argument and the Court was left with the impression that the property owners had been given no opportunity to subdivide their property. As a matter of fact, under the Charter as we have pointed out above, any property owner can subdivide his property at any time. All that is required is that he file a plat dedicating streets, which plat has first obtained the approval of the Board of Public Improvements. Now in this case the property owners expressly refused to file such a plat. They evidently felt that for their own purposes they would rather have the large tract as it is in spite of the burden of taxation. However that may be, at the time that the contract was let for the improvement of Broadway

and at the time the tax bills were issued, there was nothing to indicate that the property of the Gast Brewing Company would be subdivided during the life of the construction work which was then done upon Broadway. Under these circumstances we do not think that the subsequent dedication of streets through the Gast property should affect the legality of tax bills issued on account of the improvement of Broadway.

IV.

Let us now call the Court's attention to some previous decisions affecting similar controversies. In the case of Gilsonite Roofing and Paving Company v. St. Louis Fair Association, 231 Mo. 589, the principal case relied upon by the appellant in support of its contention that the City Charter was unconstitutional was the case of Norwood v. Baker, 172 U. S. 269. In that case, however, it will be observed that the question presented was raised in a condemnation suit, and not in a suit on a tax bill for improvements. The result which had been accomplished was, that a strip of land belonging to the appellee had been taken by the City of Norwood without compensation and used for a street, and in addition to that the adjoining property belonging to appellee had been taxed to pay for the expense of the proceeding. The majority of the Court was of the opinion that this was a taking of property without compensation and without due process of law. Subsequently, the case of French v. Barber Asphalt Paving Co., 181 U. S. 324, was presented to the Supreme Court of the United States for determination, and the case of Norwood v. Baker was relied upon by the plaintiff in error to reverse the decision of

the State Supreme Court (158 Mo., 534). At the same time that the decision in that case was handed down by the Federal Supreme Court, the further decisions in the cases of Wight v. Davidson, 181 U. S. 271; Tonawanda v. Lyon, 181 U. S. 389; Webster v. Fargo, 181 U. S. 394; Cass Farm Co. v. Detroit, 181 U. S. 396, and Detroit v Parker, 181 U. S. 399, were also decided. In the opinion in the case of Tonawanda v. Lyon, 181 U. S. 389, at page 391, we find the following language:

> "It was not the intention of the Court in that case (that is the case of Norwood v. Baker), to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States."

This language is again repeated in the case of Cass Farm Company v. Detroit, at page 398, and again in the case of Detroit v. Parker, at page 401; and in the case of French v. Barber Asphalt Paving Co., 181 U. S. 324, at page 337, the Court quotes from the opinion in the case of Spencer v. Merchant, 125 U. S. 345, the language which was quoted in that case from the decision of the Court of Appeals of the District of Columbia, from which Court the case had been appealed to the Supreme Court.

> "The Act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground

that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. * * * The lands might have been benefited by the improvement, and so the legislative determination that they were and to what amount or proportion of the cost, even if it may have been mistakingly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power its decision must, of course, be final."

Similar language is used throughout the opinion. For example, at page 339:

"The legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefits and should therefore bear the burden. * * * But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands have been benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

And again, at page 341:

> "The legislature, when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question."

And again, at the bottom of page 342:

> "The rule of apportionment among the parcels of land benefited also rest within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

We think that enough has been quoted to show that the effect of the decision in the case of French v. Barber Asphalt Paving Co., is, that, where the legislature has acted by a general law, defining assessment districts which shall apply generally, and has determined that property lying within the district so defined is benefited, and has determined that such property is benefited in certain proportions and how much of the cost of the improvement shall be borne by various parcels within the district, that determination of the legislature is a conclusive finding of fact binding upon the owners and upon the Court, and a finding which the Courts will not review.

V.

If the plaintiff in error's property could not be constitutionally included in the assessment district for Broadway, then any one of three results might con-

ceivably follow, namely: 1. The Court might simply declare that the **assessment was void as to plaintiff in error's property,** but valid as to other property which could be constitutionally included within the district. 2. The Court might declare that the **ordinance** for the improvement was void, so that no taxes could be assessed for this improvement. 3. The Court might declare that the provisions of the **Charter,** in accordance with which this ordinance was passed, were void, so that no tax bills issued under any ordinance passed pursuant to the Charter could be collected.

Now the construction which has been placed by many upon the Court's opinion in the present case is that it does the third of the above suggested possibilities. Here the Court was confronted with a single case and with some other cases reported in the Supreme Court reports of the State of Missouri. It was not confronted with the many thousands of cases where no irregularities in the assessment district could be found. We venture to say that in ninety-nine cases out of a hundred a taxing district for work done under the Charter provisions in question would be found to present either no irregularities or irregularities of an insignificant character. If the Court were here confronted with a case of a different sort, where no irregularities could be found in the district, would it say that nevertheless the tax bills were invalid because of the fact that district lines drawn for other improvements might present unjust inequalities? If a case were presented here in which the boundaries of the district were entirely uniform, we do not believe that the Court would hear arguments as to the conceivable effect which might be created under different circumstances by following the

provision of the Charter. We repeat what was said above; each case should be treated upon its own merits just as if there had been special legislation defining the district. The Court will thus be considering merely the validity of the ordinance for the improvement which adopts the district line as defined by the Charter. If the district thus adopted presents unconstitutional irregularities, the ordinance alone would be affected. Another ordinance might present no such irregularities. The mere fact that the present ordinance is deemed to work an unconstitutional discrimination against the plaintiff in error should not be made a reason for declaring other ordinances invalid though those ordinances are entirely equal and uniform in their method of assessing taxes.

It is obvious that the Court was considering the particular case at bar and certain other cases in the Missouri reports, and was not considering the innumerable cases where the district is regular. This appears from the following language of the opinion:

> "If the law is of such character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact."

And again:

> "The defendants' case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance

following the orders of the Charter is bad upon its face as distributing a local tax in grossly unequal proportions not because of special considerations applicable to the parcels taxed but in blind obedience to a rule that requires the result. And it cannot be said that the ordinace as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The Charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the State courts."

Now, we have attempted to show above that the purpose of the amendments to the Charter of 1901 was to do away with the manifest injustice of the front-foot rule. It was deemed that these provisions would do substantial justice, and these provisions have been enforced for fifteen years. While they have been attacked here and there by certain persons who owned undivided tracts which they deemed were improperly assessed, still during those fifteen years the majority of people have paid their taxes. The provision has been generally deemed to be one which would accomplish substantial justice. The fact that a new Charter has been recently passed in St. Louis is not material to this controversy. We understand that it was suggested in the argument that this new Charter was passed because it was felt that there was some defect in these provisions of the old Charter. We do not believe that there is any foundation for the statement. We do not think that it was ever suggested before the Board of Freeholders that the provisions of the old Charter were invalid. The agitation for the new Charter was upon totally different grounds and affected the powers of the Mayor

and the constitution of the municipal assembly, and the incorporation of provisions for the initiative, referendum and recall. The new Charter provides for a civil service in place of the former so-called spoils system, and provides for a concentration of power which was absent under the old one. The provisions for the levying of special taxes had nothing to do with the adoption of the new Charter. There was no agitation for the change of those provisions so far as we are aware. One might as well argue that the front-foot rule was shown to be invalid because in 1901 the city abandoned it and adopted the provisions in controversy.

We do not believe that the general experience of the City of St. Lóuis during the past fifteen years would be in accord with the contention of plaintiff in error, that there is no reasonable presumption that substantial justice generally will be done. The scheme adopted is a very rational and just one in ordinary cases. It is only in exceptional cases where any injustice will appear, if at all. Why should those exceptional cases be made the basis for a ruling that the entire provisions of the Charter are invalid, so that no taxes can be levied under that instrument? Yet the general construction placed upon the opinion, so far as we can ascertain, is to the effect that it declares the Charter itself invalid so far as the amendments in controversy are concerned. That contention will have to be met by every contractor who has tax bills in his possession and by every bank and trust company which has them. And if the present opinion is not modified the doubt created as to its construction and the doubts cast upon the validity of all tax bills will require the bringing

up of another case which presents none of the irregularities presented here.

We submit, therefore, that if a rehearing is denied the opinion should be so modified as to show that it is not intended to hold the provisions of the Charter invalid, but only to hold that the particular ordinance in question is invalid as to the plaintiff in error's property.

This brings us to the further distinction between the first and second results above pointed out, namely, between a finding that the assessment as to the plaintiff in error's property is void, and a finding that the entire ordinance is void. It will be obvious at a glance that the inclusion of plaintiff in error's property in the district reduced the taxation on all other property in the district. The owners of such other property, therefore, should not be heard to complain because the plaintiff in error's property has been illegally included in the district. We believe, therefore, that the decision should be confined to the particular assessment against plaintiff in error's property. If, however, we are mistaken in this, then we submit that at most the Court should simply declare the particular ordinance in question void without referring to what might be held as to other ordinances affecting other property and adopting the rule asserted in the Charter.

Respectfully submitted,

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